United Fresh Fruit & Vegetable Association

April 9, 2003

A.J. Yates
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
Stop 0249, Room 2092-S
1400 Independence Avenue SW
Washington, DC 20250-0249

RE: Country of Origin Labeling Program

Dear Administrator Yates:

The United Fresh Fruit and Vegetable Association (United) is pleased to submit comments on behalf of our members regarding USDA's implementation of country of origin labeling requirements under the Farm Security and Rural Investment Act of 2002, PL 107-171, ("the Act").

Founded in 1904, United's mission is to promote the growth and success of produce companies and their partners. United is a vertically integrated national trade organization that represents the interests of growers, shippers, fresh-cut processors, brokers, wholesalers and distributors of produce, working together with their customers at retail and foodservice, suppliers throughout the distribution chain, and international partners.

We respectfully urge the Department's careful consideration of these comments. We believe the Department's challenge in finding consensus on these matters may be similar to our own experience. United members generally include a diverse range of views on most topics, owing to their varying perspectives as U.S. growers, worldwide importers to the United States, packers, shippers and marketers, fresh-cut processors, supermarket wholesalers and retailers, and more.

In the case of USDA's implementation of country of origin regulations, we have purposely sought to listen carefully to that diverse range of opinion through open industry forums, discussions with our members at our recent annual convention in Long Beach, and direct review of these comments in draft form by some 150 industry leaders who serve as volunteers on our five Policy Councils and Board of Directors. We've heard a surprising consensus among these diverse interests, and as such, believe these comments provide USDA a useful road-map to meet its regulatory requirements under the Act.

We offer three general comments as goals for implementing the rule, followed by our specific regulatory recommendations:

Be Precise and Be Timely

First, we urge USDA to work seriously to publish a proposed final rule with as much detail as possible, as quickly as possible, and no later than October 1, 2003. Because the industry must be in compliance with the Act at October 1, 2004, it is critical to have as much advance notice as possible from USDA as to the likely final form of the implementing regulations. No matter what form the final rule takes, USDA must give the industry as much certainty as possible as quickly as possible in order to prevent major economic disruption and unnecessary costs.

Follow Existing Law Wherever Possible

Secondly, we urge USDA to carefully study all existing laws, rules and regulations affecting "covered commodities" under the Act, so as to avoid adding new and unnecessary requirements on any party in the distribution chain. Because perishable agricultural commodities are already regulated extensively under the Perishable Agricultural Commodities Act, fruits and vegetables subject to the Act should be addressed in such a way as to minimize duplicate requirements and potential conflict between PACA and new regulations to be proposed. The law specifically defines as covered commodities those products subject to the PACA. As such, the Act contains clears reference to Congressional intent that regulations for country of origin labeling would necessarily complement PACA requirements, not compete with such requirements.

In addition to PACA, the Tariff Act of 1930 governs labeling of imported blended product, and is sufficient to meet country of origin declaration under the Act. Finally, other laws and regulations will be informative to the Department in shaping its own approach to COO labeling, rather than adopting a new regulatory framework that adds costs and burdens to industry. The voluntary guidelines are a vast expansion of regulatory requirements, and do not reflect the intent of the Act. USDA's new regulations should only add to current requirements on produce growers, marketers and retailers where absolutely necessary to implement the Act.

Develop Separate Regulations for Different Covered Commodities

Third, we strongly urge USDA to propose a separate regulatory scheme for fresh fruits and vegetables from all other covered commodities under the law. There are huge distinctions between fresh fruits and vegetables and other covered commodities, which make a single set of regulations inefficient, ineffective and costly. There is nothing in the statute that would preclude USDA from implementing the Act through separate regulations for different commodities.

With those general comments, we urge USDA to consider the specific comments below.

1. Validity and Acceptability of Country of Origin Declaration Under PACA

United proposes that USDA specifically recognize that country of origin declarations made by sellers of produce are legally required to be accurate under other statutes, such as the PACA. The final rule should specifically state that USDA recognizes that existing PACA law requires produce sellers to be truthful in any declaration of COO by carton markings, invoice, written

contract, or verbal contract with a produce buyer. The regulation should also state that COO declaration by a produce seller may be relied upon as truthful and accurate by anyone else in the distribution chain, and repeated with impunity in further sales of the same product.

USDA should further state that such declaration of COO by a produce seller may be relied upon by retailers required to inform consumers under the Act, and that any further communication of this information to consumers through stickers, labels, signage or other means would be prima facia evidence that such communication by the retailer is ***not*** a willful violation under this Act. Should a false representation of COO by a produce supplier be determined, this would be a clear violation of the PACA, and retailers and others in the distribution chain should face no liability for relying upon such declaration already subject to legal requirements of PACA.

At present, produce sellers are not required to provide COO declaration, although if such information is provided, it must be truthful and accurate. USDA may wish to require COO declaration as a part of produce sales transactions, in order to facilitate communication of such information to final retailers. However, if left discretionary, we would recommend and anticipate that buyers of produce at all levels will specifically ask suppliers for COO declaration.

In order to commit a willful violation under the Act, USDA should state that a retailer must intentionally change the information regarding COO provided by a produce seller, intentionally obfuscate that information in a systematic way, or demonstrate repeated and wanton disregard for communicating COO information as required by the Act.

This provision obviates the need for supermarket retailers to audit suppliers or otherwise independently confirm the COO of products sold by PACA licensees who are already legally required to make truthful declarations. This would recognize retailers' responsibility under the Act as similar to other federal labeling laws such as the Nutrition Labeling and Education Act in which food manufacturers are legally responsible for the accuracy of the information on labels. In this case, PACA already makes produce sellers legally responsible for the accuracy of the information they convey, thus retailers should have no further responsibility nor reason to verify that information.

2. Validity and Acceptability of Country of Origin Declaration for Blended Products Under Tariff Act of 1930

Similarly, USDA should rely upon the legal declaration of COO currently required under the Tariff Act of 1930 for blended or processed products. In this case, Customs already requires produce marketers to disclose COO on products labeled for consumer purchase. USDA should accept the form and content of such declarations as sufficient for meeting the requirements under the Act.

USDA's voluntary guidelines for blended products show a regulatory response far different from Congressional intent. Based on the record, it is clear that Congress intended to make information available to consumers simply about the origin of a product. In a blended product

such as a bagged salad or fruit cup, labeling that references the COO of all products contained therein – without specific reference to the individual ingredient – clearly complies with Congressional intent. For example, consumers do not need to know whether the carrots or the lettuce in a bagged salad came from Canada or the United States, but simply that the product contains produce from both countries.

Nor is there any indication that Congress intended that consumers know which produce ingredient weighs more, the carrots or lettuce. Therefore, we strongly urge USDA to accept current regulations under the Tariff Act of 1930 that require consumer ready products to simply label the COO of all ingredients in the package. A label that states "Product of Canada and the U.S." clearly complies with Congressional intent, without regard to weight of the ingredients or whether it was the carrots or lettuce that indeed came from which country.

Because the Tariff Act does not address exclusively U.S. grown products, USDA should simply require a label statement on such blended products grown entirely in the United States that meets the acceptable declaration standards for "U.S." products.

We urge USDA to specifically address the issue of foods prepared either in-store or in central foodservice facilities that are not to be considered covered commodities under the Act. Others have suggested that USDA's regulations may inhibit prepared foods such as convenient, freshly cut, or blended fruits or vegetables. We suggest that deli items, salad bars, and prepared fresh foods that actually fit the standard of restaurant or foodservice items be addressed specifically by USDA. It is important that USDA implement country of origin regulations that put such foods sold at retail supermarkets on the same competitive playing field as restaurant foods that are exempt under the Act. We encourage USDA to study other regulations of the Department and other agencies that may illuminate how to draw these lines most efficiently.

3. Recordkeeping

We raise with USDA the serious question as to what, if any, records are indeed mandated by the Act. The Act states that "the Secretary '***may***' require **. . .** a verifiable record-keeping audit trail." This contrasts directly with several other provisions of the Act in which the obligations are mandated with the word "***shall***." Therefore, USDA has the discretion not to require any additional recordkeeping or audit trail. We urge your review of the comments of Florida Fruit and Vegetable Association as to the State of Florida's country of origin labeling requirement operating successfully without any recordkeeping or audit requirement.

Should USDA, for some reason yet not clear, wish to require recordkeeping not mandated by the Act, we urge the Department to confine record needs to identification and proof of country of origin for specific covered commodities at the time they are being offered to consumers for sale. A retailer should only need to be able to justify the information communicated to consumers at retail sale ***while the product is actually for sale***. For example, a consumer picks up a piece of fruit from a bin and looks to see where it was grown. The only record-keeping question relevant to that moment – the entire intent of the Act -- is whether the retailer can provide adequate evidence to justify the country designation. We can conceive of no logical reason under the Act

why USDA would want to require justification of what product was sold from which country *last week, last month or last year.* The only audit trail that matters is whether upon consumer inspection (or inspection by USDA), the retailer can adequately demonstrate support for the COO declaration being made at the moment of sale.

In such case, it is important that USDA allow retailers to provide evidence confirming accurate COO markings at retail sale through whatever means it chooses. The suggestion that store managers might need to have records on hand to provide such information is needlessly cumbersome and prescriptive. If an inspector asks a retail store manager for justification of in-store COO marking, that store should have the opportunity to provide such information within some reasonable time frame in whatever form it chooses. For example, a store manager could call his distribution center or headquarters to get records of what produce was delivered to the store. We suggest that USDA use the discretion clearly provided by Congress to implement a regulation that meets the intent of the Act, rather than adds needless burdens and opportunities for punitive actions on the industry.

Because sales transactions of produce commodities are already subject to PACA requirements for two years of recordkeeping to substantiate market transactions, we believe USDA should have no concerns about any further recordkeeping requirements. Although we cannot envision a case where auditing historical records of COO would make any sense in fulfilling the purposes of the Act, the PACA records requirement provides a abundant back-up option for information.

We respectfully suggest that no additional recordkeeping whatsoever, other than that needed to provide timely identification of product -- *while it is offered for sale* -- is needed to comply with Act.

4. Adequacy of Consumer Information

In the final rule, we urge USDA to specifically define circumstances that adequately communicate to consumers COO at retail sale. To comply with the Act, retailers must ensure that when consumers are evaluating produce at point of retail sale, they must have the reasonable ability to tell where a product has been grown. This standard is sufficient to comply with the Act, which does not mandate the specific methods nor adequacy of consumer communication. It is completely within USDA's prerogative to define circumstances that substantially comply with the intent of the Act.

Adequacy of Stickering on Produce Commodities/Bulk Produce Displays

USDA should specifically state in the final regulation that a bulk retail display of produce complies with the Act if a sufficient number of items in the display are labeled so that a consumer can reasonably determine the origin of products at the point of purchase. While retailers always have the discretion to use signs, placards or other communications to convey COO, USDA should state affirmatively that no further signage would be required to comply with the Act. This standard substantially complies with the Act for consumer information, while

recognizing the reality that stickers cannot be affixed to every piece of produce through packing and retail sale.

An informative judgment on what amount of product labeling would be sufficient for consumer information is provided by the Food and Drug Administration's handling of sulfite labeling on bunches of grapes. The FDA agreed that tags on only 50% of the grape bunches were sufficient to give notice to sulfite sensitive consumers that grapes in the display had been treated with sulfur dioxide. If the FDA found 50% product labeling sufficient even in this case of human health, we are confident that such a standard would be more than sufficient for adequate disclosure of country of origin.

This example also provides useful experience for USDA, given that bunches of grapes were tagged, not individual grapes. USDA should state that for produce items generally sold in attached quantities, such as bananas and grapes, that the labeling of the cluster rather than the individual piece of fruit is sufficient. This recognizes that consumers sometimes break apart clusters, thus leaving some pieces of fruit without a label.

We also urge USDA to develop a final regulation that allows for commingled produce from different countries in one bulk display, so long as consumers can reasonably determine the origin of products. We recommend that the standards for individual product labeling in a commingled display be higher than in a bulk display of product from a single country. We suggest that standard be set at 75% of the produce items being stickered with qualified country of origin information. In such case, no further signage would be required to comply with the Act. We believe this standard substantially complies with Act for consumer information, while recognizing the reality that bulk displays at retail commonly contain products from more than one country. For example, if a retailer has one display of bananas with fruit from both Costa Rica and Ecuador, the retailer is in compliance so long as 75% of the bananas in the display carry accurate stickers.

This is likely to be an important issue for USDA to decide. While a purist might argue that the 25% of produce potentially unlabeled in such a display could be confusing, there is no evidence in the Act that would suggest Congress intended to force 100% accuracy, nor even suggest that such a goal is physically achievable. It is not, whether through stickers falling off commodities or consumers misplacing produce back into the wrong country bin. We do not believe Congress intended to require fundamental changes in produce marketing or massive redesign of produce departments at retail. Should USDA require completely separate and isolated bins or displays of product from different countries, we are very concerned about significant added costs and unintended quite negative consequences of such action.

Rather than add multiple bins and manage separate displays, a logical retail response would be to require more pre-packaged items, thus losing the great consumer appeal of bulk, colorful, and fragrant produce displays that are important in public health. In addition, retailers might logically reduce the number of suppliers of fruits and vegetables, rather than maintain several separate bins. This will not always work in favor of U.S. growers, as retailers might simply choose to maintain bins of fruit from other countries. Finally, retailers would be unlikely to increase shelf space needed to maintain separate bins for product that comes from multiple

countries throughout the year. This too would have a detrimental impact on health. While American consumers desperately need fresh fruits and vegetables year-round for better health, a COO regulation requiring separate bins by country would inhibit consumer access and choice.

Therefore, we believe USDA should work hard to justify a regulation that complies with the intent of the Act, while specifically allowing for mixed bulk displays so long as products are individually labeled as suggested above.

Finally, we support USDA's current thinking that the style, color, size, font, etc, for stickers, labels, and signage should not be prescriptive but be left up to the industry.

Adequacy of Country Name

USDA should specifically state in the final regulation that an individual country name is sufficient to meet COO declarations, whether on stickers or in signage. The voluntary guidelines are overly prescriptive in requiring the words "Product of" in order to comply with the statute. A mere listing of the country name is sufficient. For example, bananas labeled as "Costa Rica" would be acceptable, rather than having to carry a label "Product of Costa Rica." Such a decision by USDA would meet consumer need for COO, while recognizing that space on stickers is severely limited. USDA should also state that the abbreviations "U.S.," "USA," and usage such as "USA Pears" are sufficient disclosure on stickers or signage.

Adequacy of State Name

USDA should specifically state in the final regulation that an individual state name, when used together with the product, is sufficient to meet COO declarations, whether on stickers or in signage. For example, "Washington Apples" or "Idaho Potatoes" should meet the requirements under the Act to communicate U.S. product.

Some USDA staff members have asserted in informal discussions that such state declaration would not comply with international trade agreements for equal treatment. We respectfully disagree, and do not anticipate any concern about the adequacy of U.S. state declarations from our international trading partners. However, if USDA determines that state declarations must be available to product from any country, we recommend that this standard be acceptable. The benefit to consumers and the produce industry of maintaining traditional U.S. state declarations such as "Idaho Potatoes" outweighs any confusion that might arise from a product labeled "British Colombian Tomatoes." However, we do not seriously anticipate that exporters to the United States would choose to use such state affiliations unfamiliar to U.S. consumers.

5. Grown Versus Processed Information Disclosure

The Act requires communication to consumers only of the country in which a product is ***grown***, not processed. Therefore, USDA should make no additional regulatory requirement to disclose country of processing.

Should a marketer of a processed perishable agricultural commodity covered under PACA desire to label a product as to both its country of origin and it country of processing, USDA should specify the labeling it would find acceptable. We propose an optional label of "Grown in country X, Processed in Country Y," be specified for those marketers who choose to label both. However, this must not be mandatory under the Act.

6. Inspections/Enforcement

It is critical that the intent of the Act be carried out with reasonable and fair enforcement. USDA should take all possible steps to ensure that enforcement is reasonable and fair, not punitive in any way, and geared toward "getting the COO declaration to consumers right" rather than punishing anyone for "getting it wrong," except in cases of willful action.

As already stated above, USDA should provide clear definition of what it would consider a willful violation under the Act, such as a produce seller deliberately falsifying COO information, or a retailer intentionally changing the information regarding COO provided by a produce seller. Inadvertent and unintentional errors should be allowed for without penalty, and companies given the opportunity to take corrective action so as to prevent the mistake from recurring. It is important to remember that consumers still pick up produce items to examine them, and sometimes put them back down in the wrong bin. Enforcement needs to be fair and reasonable.

In accordance with the Act, COO inspections at retail may be carried out by states under an agreement with USDA. It is essential that any penalties from enforcement by states or USDA revert to the general U.S. treasury. This would be similar to PACA enforcement penalties, and is essential in order to prevent inspections from becoming a profit center for enforcing agencies or states. There can be no "meter maid" incentives for inspections or enforcement in which the enforcing body is rewarded for penalizing the industry.

7. Funding for USDA/State Activities

Funding to implement, manage and enforce COO regulations must be authorized and appropriated by Congress and clearly designated by USDA. In no way can funds or staff paid for by produce industry user fees be allocated to COO labeling programs. In addition, the produce industry would strongly oppose any diversion of funds within AMS or USDA away from current produce related programs toward COO programs. Since this law and implementation thereof is a new Congressional mandate to USDA, funds for its administration must not come from existing programs.

We request USDA publish its intention of where funds to administer this program will come from, as part of the public comment and rulemaking process. We also request that USDA summarize all costs to date in the administration of this program, and publish comment on how these funds will be reimbursed to AMS programs so as not to dilute the Agency's important work with the fruit and vegetable industry.

Thank you for the opportunity to contribute to shaping a workable regulation for the produce industry. If you have any questions about any of our comments, please contact us immediately.

Sincerely,

THOMAS E. STENZEL
President & CEO